Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

Nos. 77-25, 77-37 and 77-42

FLAGG BROTHERS, INC., individually and as representative of a class of all others similarly situated, HENRY FLAGG, individually and as President of Flagg Brothers, Inc., THE AMERICAN WAREHOUSEMENS' ASSOCIATION, THE INTERNATIONAL ASSOCIATION OF REFRIGERATED WAREHOUSES, INC., WAREHOUSEMEN'S ASSOCIATION OF NEW YORK AND NEW JERSEY, INC., THE COLD STORAGE WAREHOUSEMEN'S ASSOCIATION OF THE PORT OF NEW YORK, and LOUIS J. LEFKOWITZ, as Attorney General of the State of New York,

Petitioners,

vs.

SHIRLEY HERRIOTT BROOKS and GLORIA JONES, individually and on behalf of all others similarly situated,

Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* ON BEHALF OF THE CITY OF NEW YORK

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BRIEF *AMICUS CURIAE* ON BEHALF OF THE CITY OF NEW YORK

This brief is submitted by the City of New York as *amicus curiae,* pursuant to Rule 42, subd. 4 of the Rules of this Court, in support of the position of the respondents Brooks and Jones.

Interest of the *Amicus*

The Department of Consumer Affairs of the City of New York has sought pursuant to statute (Local Law No. 83, 1969, N.Y.C. Admin. Code, Title A, Ch. 64) to protect the interests of consumers within its jurisdiction from fraudulent or overreaching practices, and in so doing to protect the interest of the business community in the jurisdiction which are injured as well by such practices. The Department receives substantial numbers of complaints involving warehousemen's liens from consumers who believe they have been abused by moving and storage firms.

The Department has been particularly active in attempting to insure that remedies on the part of creditors including but not limited to lien holders for collection of amounts allegedly due are fair as well as effective. See, e.g., Consumer Protection Law Regulation 4 (pertaining to pressure on employers by creditors), upheld in *Commercial Lawyers Conference* v. *Grant,* 65 Misc. 2d 897, 318 N.Y.S. 2d 966 (Sup. Ct. 1971).

In addition, the Department plays an important role in preserving the integrity of the judicial process in connection with such matters, through its licensing of process servers, New York City Administrative Code Chapter 32, Title B, § B32-450.0 *et seq.* This has led to a number of actions vacating default judgments where abuses have occurred.

The benefits to be derived from these efforts of the Department on behalf of the public and the business community would be rendered ineffective to the extent that exercise of liens for disputed amounts without recourse effective to preserve the rights of the alleged debtors is upheld.

ARGUMENT

I. State Action Should Be Found In The Execution of A Statutory Warehouseman's Lien.

It is firmly established that the judicial process of a state is state action within the meaning of the Fourteenth Amendment, e.g., *Shelley* v. *Kraemer,* 334 U.S. 1 (1948); *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337 (1969). Private acts which are part of judicial machinery have also been found to constitute state action even in the context of criminal prosecution. *United States* v. *Wiseman,* 445 F.2d 792 (2d Cir. 1971), *cert. denied,* 404 U.S. 967 (1971).

The statutory warehouseman's lien in issue (N.Y.U.C.C. §§ 7-209 and 7-210) is a substitute for that judicial process, erected by the state, which expressly authorizes private parties to carry out the statutory scheme.

The state, of course, defines property rights. The act of establishing such definitions is, of course, state action in the ordinary sense, whereas the conduct of private parties in transferring property pursuant to such state-created rights is private action in the ordinary sense and would not normally constitute state action.

Here, however, no consensual agreement to the lien or its enforcement is present or necessary under the statute. We are not dealing with a situation where a party knowingly creates a property interest in another pursuant to rules of the game established by the state. This, of course, would normally be interpreted as the act of the parties and

not of the rule-making state. Rather, here the state by statute inserts into the normal flow of consensual arrangements of private parties, a statutory procedure giving one of the parties powers usually possessed by the state: the right to compulsory taking of the property of another. This power, whether analogized to the act of the sheriff in seizing an item, or the exercise of the power of eminent domain, is compulsion and is thus state action under any test. See Hale, "Force and the State: A Comparison of 'Political' and 'Economic' Compulsion" 35 Colum. L. Rev. 149 (1935); *Parks* v. *"Mr. Ford,"* 556 F.2d 132, 141 (3d Cir. 1977); *Cox Bakeries* v. *Timm Moving & Storage, Inc.*, 554 F.2d 356, 358 (8th Cir. 1977); *Hernandez* v. *European Auto Collision, Inc.*, 487 F.2d 378 (2d Cir. 1973), cf. *Blye* v. *Globe-Wernicke Realty Co.*, 33 N.Y.2d 15 (1973). *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345 (1974), and other cases where state action was found lacking did not involve these elements.

Moreover, the practical impact is to deprive citizens of rights which they would otherwise have, to safeguards present in the judicial process The unilateral action of the warehouseman can deprive the customer of all interest in the goods. No action on the part of the other party is required.

Where the judicial process is utilized, notice and an opportunity to be heard are necessary. *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975). Similarly, the state itself has often erected safeguards to prevent the abuse of "default judgments" where a party does nothing, and the other may obtain an unfair advantage due to difficulty or inability of the defendant to obtain counsel or to respond for other reasons. E.g., New York Judiciary Law §217(a); *In re Vigilant Protective Systems, Inc.*, 333 F.Supp. 1029 (S.D.N.Y. 1971).

The practical effects of a decision on the state action issue, while not dispositive of the legal issue, bear discussion because petitioners give them much stress. A finding of state action would not have the catastrophic effects predicted by counsel for the warehousemen before this Court. Once due process is applicable, its parameters depend on the circumstances; a "rule of reason" applies. Compare *Mitchell* v. *W.T. Grant Co.*, 416 U.S. 600 (1974), with *North Georgia Finish, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975).

The state action question is a threshold question. For this Court to hold that what is involved here is not state action would deprive those affected by these state-created lien procedures of any constitutional protection. This would be seriously detrimental to the interests of the public and of the business community. On the other hand, a finding of state action does not compel automatic imposition of all of the detailed safeguards normally present in judicial proceedings.

The validity of a particular self-help creditor enforcement procedure obviously depends on the factual setting. Requirements applicable to judicial proceedings are not mechanically transferable as a matter of constitutional law. On the other hand, a rudimentary opportunity to obtain an impartial ruling on contested matters seems inherent in basic fairness. Without this, the weaker party under the statutory framework is deprived of any effective recourse at all: the warehousemen can claim any amount, no matter how hyperbolic, and simply sell the victim's property to satisfy the most insatiable demands. The only recourse would be a plenary action later, if the party can afford it, with uncertain and delayed results.

Based on the prior decisions of this Court, the constitutional requirements in such a situation would seem to

involve (1) advance notice to the owner of the goods of the amounts claimed, the basis for the charges, and the date and arrangements for any auction planned, and what recourses are available to the owner, with sufficient time for the owner to appear or take other action, and (2) some hearing procedure short of filing a plenary lawsuit, which would give the owner an opportunity to be heard on whether there is a valid contract, the amount payable, and whether the charges claimed are at least reasonable and within the contemplation of the parties at the time of the original transaction.

Due process requires at least this. Compare *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U.S. 601 (1975); *Walker* v. *City of Hutchinson*, 352 U.S. 112 (1956); *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Wuchter* v. *Pizzutti*, 276 U.S. 13 (1928). The combination of judge, jury, legislature and sheriff in the hands of one party here is too much. Cf. *Tumey* v. *Ohio*, 273 U.S. 510 (1927).

CONCLUSION

The judgment below should be affirmed so that, as Mr. Justice Clark stated in *Cox Bakeries* v. *Timm Moving & Storage, Inc.*, 554 F.2d 356, 360 (8th Cir. 1977), owners of goods will not be "at the unsupervised mercy of [warehousemen] without any judicial supervision or control whatever . . .".

December 22, 1977

Respectfully submitted,

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